

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF NEVADA  
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5 DORIS L. THOMAS, )

6 Plaintiff, )

7 v. )

8 CAROLYN COLVIN, )  
9 Acting Commissioner of Social Security, )  
10 Defendant. )  
11

3:13-cv-00460-HDM-VPC

**REPORT AND RECOMMENDATION**  
**OF U.S. MAGISTRATE JUDGE**

May 13, 2014

12 This Report and Recommendation is made to the Honorable Howard D. McKibben, United  
13 States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28  
14 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the court is plaintiff's motion for remand and/or  
15 reversal (#15).<sup>1</sup> Defendant filed a cross-motion to affirm (#17). For the reasons set forth below, the  
16 court recommends that plaintiff's motion for remand and/or reversal be denied, and defendant's  
17 cross-motion to affirm be granted.  
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19 **I. FACTUAL AND PROCEDURAL BACKGROUND**  
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21 Plaintiff Doris Lizette Taylor ("plaintiff") was a forty-nine-year-old woman with at least a  
22 high school education on the alleged disability date of March 15, 2009 (Administrative Record  
23 ("AR") 38, 47). On August 24, 2009, she filed an application for disability insurance benefits under  
24 Title II. *Id.* at 38. Defendant Commissioner denied plaintiff's application initially and on  
25 reconsideration. *Id.*  
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<sup>1</sup> Refers to the court's docket number.

On October 19, 2011, plaintiff and her attorney appeared at a hearing before Administrative Law Judge (“ALJ”) Eileen Burlison. *Id.* at 55-81. The ALJ followed the five-step sequential process for evaluating disability claims, set forth in 20 C.F.R. § 404.1520, and issued a written decision on April 19, 2012, finding plaintiff had “not been disabled” pursuant to the Social Security Act at any time from the alleged onset date through the date of the ALJ’s decision. *Id.* at 38-49. Plaintiff appealed, and the Appeals Council denied review. *Id.* at 1-28. Thus, the ALJ’s decision became the final decision of the Commissioner.

On August 27, 2013, having exhausted all administrative remedies, plaintiff, through counsel, filed a complaint for judicial review (#1-1). Plaintiff argues that the ALJ’s decision was based on legal error, in that her determination of plaintiff’s Residual Functional Capacity (“RFC”) and her credibility findings were not supported by substantial evidence in the record (#15, pp. 7-18). Accordingly, plaintiff asks the court to reverse or remand the ALJ’s decision. *Id.* at 1.

## II. STANDARD OF REVIEW

The court must affirm the ALJ’s determination if it is based on proper legal standards and the findings are supported by substantial evidence in the record. *Stout v. Comm’r Soc. Sec. Admin.*, 454 F.3d 1050, 1052 (9th Cir. 2006); *see also* 42 U.S.C. § 405(g) (“findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive”). “Substantial evidence is more than a mere scintilla but less than a preponderance.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9<sup>th</sup> Cir. 2005) (internal quotation marks and citation omitted). “It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)); *see also Webb v. Barnhart*, 433 F.3d 683, 686 (9<sup>th</sup> Cir. 2005).

To determine whether substantial evidence exists, the court must look at the record as a whole, considering both evidence that supports and undermines the ALJ's decision. *Orteza v. Shalala*, 50 F.3d 748, 749 (9<sup>th</sup> Cir. 1995) (citation omitted). "However, if evidence is susceptible of more than one rational interpretation, the decision of the ALJ must be upheld." *Id.* at 749 (citation omitted). The ALJ alone is responsible for determining credibility and for resolving ambiguities. *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999).

The initial burden of proof rests upon the claimant to establish disability. 20 C.F.R. § 404.1512(a); *Howard v. Heckler*, 782 F.2d 1484, 1486 (9<sup>th</sup> Cir. 1986) (citations omitted). To meet this burden, a plaintiff must demonstrate an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected . . . to last for a continuous period of not less than 12 months . . ." 42 U.S.C. § 423 (d)(1)(A).

### III. DISCUSSION

#### A. Five-Step Sequential Process

The Commissioner has established a five-step sequential process for determining whether a person is disabled. 20 C.F.R. § 404.1520; *see also Bowen v. Yuckert*, 482 U.S. 137, 140-41 (1987). If at any step the Social Security Administration (SSA) can make a finding of disability or nondisability, a determination will be made and the SSA will not further review the claim. 20 C.F.R. § 404.1520(a)(4); *see also Barnhart v. Thomas*, 540 U.S. 20, 24 (2003).

In the first step, the Commissioner determines whether the claimant is engaged in "substantial gainful activity"; if so, a finding of nondisability is made and the claim is denied. 20 C.F.R. § 404.1520(a)(4)(i), (b); *Yuckert*, 482 U.S. at 140. If the claimant is not engaged in substantial gainful activity, the Commissioner proceeds to step two.

1           The second step requires the Commissioner to determine whether the claimant's impairment  
2 or combinations of impairments are "severe." 20 C.F.R. § 404.1520(a)(4)(ii), (c); *Yuckert*, 482 U.S.  
3 at 140-41. An impairment is severe if it significantly limits the claimant's physical or mental ability  
4 to do basic work activities. *Id.* Basic work activities are "the abilities and aptitudes necessary to do  
5 most jobs[.]" which include: "(1) [p]hysical functions such as walking, standing, sitting, lifting,  
6 pushing, pulling reaching, carrying, or handling; (2) [c]apacities for seeing, hearing, and speaking;  
7 (3) [u]nderstanding, carrying out, and remembering simple instructions; (4) [u]se of judgment; (5)  
8 [r]esponding appropriately to supervision, co-workers and usual work situations; and (6) [d]ealing  
9 with changes in a routine work setting." 20 C.F.R. § 404.1521. If a claimant's impairment is so  
10 slight that it causes no more than minimal functional limitations, the Commissioner will find that the  
11 claimant is not disabled. 20 C.F.R. § 404.1520(a)(4)(ii), (c). If, however, the Commissioner finds  
12 that the claimant's impairment is severe, the Commissioner proceeds to step three. *Id.*

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15           In the third step, the Commissioner determines whether the impairment is equivalent to one  
16 of a number of specific impairments listed in 20 C.F.R. pt. 404, subpt. P, app.1 ("Listed  
17 Impairments"). 20 C.F.R. § 404.1520(a)(4)(iii), (d). The Commissioner presumes the Listed  
18 Impairments are severe enough to preclude any gainful activity, regardless of age, education, or  
19 work experience. 20 C.F.R. § 404.1525(a). If the claimant's impairment meets or equals one of the  
20 Listed Impairments, and is of sufficient duration, the claimant is conclusively presumed disabled. 20  
21 C.F.R. § 404.1520(a)(4)(iii), (d). If the claimant's impairment is severe, but does not meet or equal  
22 one of the Listed Impairments, the Commissioner proceeds to step four. *Yuckert*, 482 U.S. at 141.

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24           In step four, the Commissioner determines whether the claimant can still perform "past  
25 relevant work." 20 C.F.R. § 404.1520(a)(4)(iv), (e), (f). Past relevant work is that which a claimant  
26 performed in the last fifteen (15) years, which lasted long enough for him or her to learn to do it, and  
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1 was substantial gainful activity. 20 C.F.R. § 404.1565(a). The ALJ reviews the claimant's "residual  
2 functional capacity" ("RFC") and the physical and mental demands of the work previously  
3 performed. *See id.*; *see also Berry v. Astrue*, 622 F.3d 1228, 1231 (9<sup>th</sup> Cir. 2010). RFC is what the  
4 claimant can still do despite his or her limitations. 20 C.F.R. § 404.1545. In determining RFC, an  
5 ALJ must assess all evidence, including the claimant's and others' descriptions of limitation, and  
6 medical reports, to determine what capacity the claimant has for work despite the impairments. *See*  
7 20 C.F.R. § 404.1545(a).

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10 At step four, the ALJ may consider any of the claimant's daily activities that "may be seen as  
11 inconsistent with the presence of a condition which would preclude all work activity." *Curry v.*  
12 *Sullivan*, 925 F.2d 1127, 1130 (9<sup>th</sup> Cir. 1990) (upholding denial of disability benefits where claimant  
13 could "take care of her personal needs, prepare easy meals, do light housework, and shop for some  
14 groceries"); *see also Burch v. Barnhart*, 400 F.3d 676, 681 (9<sup>th</sup> Cir. 2005) (upholding denial of  
15 benefits based in part on determination that claimant performed daily activities that were  
16 transferrable to a work setting); compare *Orn v. Astrue*, 495 F.3d 625, 639 (9<sup>th</sup> Cir. 2007)  
17 (concluding activities not transferrable to work setting); *Reddick v. Chater*, 157 F.3d 715, 722 (9<sup>th</sup>  
18 Cir. 1998) (claimant should not be "penalized for attempting to lead [a] normal [life] in the face of  
19 [her] limitations"); *Fair v. Bowen*, 885 F.2d 597, 603 (9<sup>th</sup> Cir. 2007) (noting that "many home  
20 activities are not easily transferable to what may be the more grueling environment of the workplace,  
21 where it might be impossible to periodically rest or take medication").

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24 A claimant can return to previous work if he or she can perform the "actual functional  
25 demands and job duties of a particular past relevant job" or "[t]he functional demands and job duties  
26 of the [past] occupation as generally required by employers throughout the national economy."  
27 *Pinto v. Massanari*, 249 F.3d 840, 845 (9<sup>th</sup> Cir. 2001) (internal quotation and citation omitted).

1 If the claimant can still do past relevant work, then he or she is not disabled for purposes of  
2 the Act. 20 C.F.R. § 404.1520(f); *see also Berry*, 662 F.3d at 131 (“Generally, a claimant who is  
3 physically and mentally capable of performing past relevant work is not disabled, whether or not he  
4 could actually obtain employment.”).

6 If, however, the claimant cannot perform past relevant work, the burden shifts to the  
7 Commissioner to establish, in step five, that the claimant can perform work available in the national  
8 economy. 20 C.F.R. § 404.1520(e), (f); *see also Yuckert*, 482 U.S. at 141-142, 144. If the claimant  
9 cannot do the work he or she did in the past, the Commissioner must consider the claimant’s RFC,  
10 age, education, and past work experience to determine whether the claimant can do other work.  
11 *Yuckert*, 482 U.S. at 141-42. The ALJ may meet this burden either through the testimony of a  
12 vocational expert or by reference to the Grids. *Tackett v. Apfel*, 180 F. 3d 1094, 1100 (9th Cir.  
13 1999).

15 “The [G]rids are matrices of the four factors identified by Congress—physical ability, age,  
16 education, and work experience—and set forth in rules that identify whether jobs requiring specific  
17 combinations of these factors exist in significant numbers in the national economy.” *Lockwood v.*  
18 *Comm’r of Soc. Sec. Admin.*, 616 F.3d 1068, 1071 (9th Cir. 2010) (internal quotation and citation  
19 omitted). The Grids place jobs into categories by their physical-exertional requirements, and there  
20 are three separate tables, one for each category: sedentary work, light work, and medium work. 20  
21 C.F.R. Part 404, Subpart P, Appx. 2, § 200.00. The Grids take administrative notice of the numbers  
22 of unskilled jobs that exist throughout the national economy at the various functional levels. *Id.*  
23 Each grid has various combinations of factors relevant to a claimant’s ability to find work, including  
24 the claimant’s age, education and work experience. *Id.* For each combination of factors, the Grids  
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1 direct a finding of disabled or not disabled based on the number of jobs in the national economy in  
2 that category. *Id.*

3       The ALJ may not rely solely on the Grids unless they accurately and completely describe the  
4 claimant's abilities and limitations. *Jones v. Heckler*, 760 F.2d 993, 998 (9<sup>th</sup> Cir. 1985) (citation  
5 omitted). The ALJ must take the testimony of a vocational expert where the claimant suffers from  
6 non-exertional limitations that are "sufficiently severe so as to significantly limit the range of work  
7 permitted by his exertional limitation." *Hoopai*, 499 F.3d at 1076 (internal quotation and citation  
8 omitted). Further, where the ALJ finds that a nonexertional limitation alone is severe [at step two of  
9 the sequential process] (absent any exertional limitation), the ALJ is not required to seek the  
10 assistance of a vocational expert at step five unless the nonexertional limitation(s) are "significant,  
11 sufficiently severe, and not accounted for in the grid[s]." *See id.* at 1076.

12       If, at step five, the ALJ establishes that the claimant can do other work which exists in the  
13 national economy, then he or she is not disabled. 20 C.F.R. § 404.1566. Conversely, if the ALJ  
14 determines the claimant unable to adjust to any other work, the claimant will be found disabled. 20  
15 C.F.R. § 404.1520(g); *see also Lockwood*, 616 F.3d at 1071; *Valentine v. Comm'r of Soc. Sec.*  
16 *Admin.*, 574 F.3d 685, 689 (9<sup>th</sup> Cir. 2009). However, "[a] finding of 'disabled' under the five-step  
17 inquiry does not automatically qualify a claimant for disability benefits." *Bustamante*, 262 F.3d at  
18 954.

## 19 **B. ALJ's Findings**

20       The ALJ found that plaintiff suffers from the severe impairments of migraines, depression,  
21 and myofascial pain syndrome secondary to chronic neck and back pain (AR 40). The ALJ  
22 determined that plaintiff has past relevant work as a loan originator, which is considered a sedentary,  
23 skilled position with a specific vocational preparation ("SVP") of 7. *Id.* at 47. The ALJ also found  
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1 that plaintiff retains the RFC to perform light, uncomplicated work of a semi-skilled nature, but with  
2 several exertional limitations. *Id.* at 42.

3 The ALJ considered plaintiff's age, education, work experience and RFC, and found that  
4 plaintiff can perform jobs that exist in significant numbers in the national economy. *Id.* at 48.  
5 Accordingly, the ALJ determined that plaintiff "has not been under a disability," as defined in the  
6 Social Security Act. *Id.* Specifically, the ALJ made the following findings:

- 8 1. The claimant meets the insured status requirements of the Social Security Act through  
9 December 31, 2013.
- 10 2. The claimant has not engaged in substantial gainful activity since March 15, 2009, the  
11 alleged onset date (20 C.F.R. § 404.1571).
- 12 3. The claimant has the following severe impairments: migraines, depression, and myofascial  
13 pain syndrome secondary to chronic neck and back pain (20 C.F.R. § 404.1520(c)).
- 14 4. The claimant does not have an impairment or combination of impairments that meets or  
15 medically equals the severity of one of the listed impairments in 20 C.F.R. Part 404, Subpart  
16 P, Appendix 1, (20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526).
- 17 5. After careful consideration of the entire record, I find that the claimant has the residual  
18 functional capacity to perform light work as defined in 20 C.F.R. § 404.1567(b) except that  
19 she may not climb; may only occasionally balance, stoop, kneel, crouch and/or crawl; and  
20 must avoid working at heights or operating dangerous moving machinery. She is further  
21 limited to uncomplicated work of a semi-skilled nature.
- 22 6. The claimant is unable to perform any past relevant work (20 C.F.R. § 404.1565).
- 23 7. The claimant was born on July 28, 1959 and 49 years old, which is defined as an individual  
24 closely approaching advanced age, on the amended disability onset date (20 C.F.R. §  
25 404.1563).
- 26 8. The claimant has at least a high school education and is able to communicate in English (20  
27 C.F.R. § 404.1564).
- 28 9. The claimant has acquired work skills from past relevant work (20 C.F.R. § 404.1568).



10. Considering the claimant's age, education, work experience, and residual functional capacity, the claimant has acquired work skills from past relevant work that are transferable to other occupations with jobs existing in significant numbers in the national economy (20 C.F.R. §§ 404.1569, 404.1569(a), 404.1568(d)).

11. The claimant has not been under a disability, as defined in the Social Security Act, from March 15, 2009, through the date of this decision (20 C.F.R. § 404.1520(g)).

*Id.* at 40-48.

### C. RFC Assessment

Plaintiff first challenges the ALJ's RFC finding and contends that the ALJ's decision was based on legal error because her RFC finding was not supported by substantial evidence in the record (#15, p. 6). Specifically, plaintiff asserts that the ALJ failed to accord proper weight to the opinion of plaintiff's treating physician. *Id.* at 7-11. Defendant responds that the ALJ discussed the treating physician's opinion in detail and offered good reasons to reject it, all of which were supported by the record and by the law (#17, p. 6).

Generally, an ALJ should give more weight to the opinion of a treating source than to the opinion of non-treating doctors. *Lester v. Chater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1995); *Winans v. Bowen*, 853 F.2d 643, 647 (9<sup>th</sup> Cir. 1987). "At least where the treating doctor's opinion is not contradicted by another doctor, it may be rejected only for 'clear and convincing' reasons. *Lester*, 81 F.3d at 830 (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9<sup>th</sup> Cir. 1991)); *Embrey v. Bowen*, 849 F.2d 418, 422 (9<sup>th</sup> Cir. 1988). "Even if the treating doctor's opinion is contradicted by another doctor, the Commissioner may not reject this opinion without providing 'specific and legitimate reasons' supported by substantial evidence in the record." *Lester*, 81 F.3d at 830 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9<sup>th</sup> Cir. 1983)).

However, "[i]t is clear that it is the responsibility of the ALJ, not the claimant's physician, to determine residual functional capacity." *Vertigan v. Halter*, 260 F.3d 1044, 1049 (9<sup>th</sup> Cir. 2001). The ALJ must also consider the opinions of state agency consultative examiners. *See Orn v. Astrue*,

1 495 F.3d 625, 632 (9<sup>th</sup> Cir. 2007). When the opinions of treating and examining doctors conflict, it  
2 is the ALJ's duty to resolve the conflicts. *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9<sup>th</sup> Cir. 1995).  
3 "[W]hen an examining physician provides 'independent clinical findings that differ from the  
4 findings of the treating physician,' such findings are 'substantial evidence.'" *Orn v. Astrue*, 495  
5 F.3d 625, 632 (9<sup>th</sup> Cir. 2007); *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9<sup>th</sup> Cir. 2001) (an  
6 examining physician's opinion "alone constitutes substantial evidence, because it rests on [the  
7 doctor's] own independent examination of [the claimant]").  
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9 Further, the ALJ must also consider the findings of fact and opinions of non-examining state  
10 agency medical and psychological consultants and other program physicians and psychologists, who  
11 are experts in Social Security disability programs. Social Security Ruling ("SSR") 96-6p, 1996 WL  
12 374186. Such consultants are "highly qualified physicians and psychologists who are experts in the  
13 evaluation of the medical issues in disability claims under the Act . . . they consider the medical  
14 evidence in disability cases and make findings of fact on medical issues, including, but not limited  
15 to, the existence and severity of an individual's impairment." *Id.* The ALJ may rely on opinions  
16 from state agency reviewers if those opinions are well-supported and consistent with the record as a  
17 whole. *Id.* "[O]pinions from State agency medical and psychological consultants and other program  
18 physicians and psychologists may be entitled to greater weight than the opinions of treating or  
19 examining sources." *Id.*  
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23 Here, the ALJ indicated that medical records reflect that plaintiff was diagnosed with chronic  
24 neck and low back pain for which she has been undergoing treatment since at least 2007 (AR 40).  
25 Treatment notes reflect that she was able to maintain a high functional level with injections and  
26 medications and worked full-time through most of 2008 with this condition. *Id.* at 41; 59; 236-243.  
27 However, she sustained multiple compression fractures of the spine in a March 2009 ATV crash. *Id.*  
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1 at 374. Plaintiff then had two vertebroplasty procedures, trigger point and steroid injections, nerve  
2 blocks and physical therapy. *Id.* at 388; 483-497. She has also been diagnosed with major  
3 depression, recurrent and mild with treatment. *Id.* at 524-26. Based on these records, the ALJ found  
4 that plaintiff had the severe impairments of migraines, depression and myofascial pain syndrome  
5 secondary to chronic neck and back pain. *Id.* at 40.

7 The ALJ considered the opinion of treating physician Abdollah Assad, M.D. *Id.* at 45-46.  
8 Dr. Assad filled out a mental medical source statement form and indicated that plaintiff is  
9 delusional/paranoid and suffers from anxiety, racing thoughts and mood swings. *Id.* at 549-554. He  
10 listed the following findings: plaintiff is depressed, has migraines, severe pain from injuries from  
11 the accident and poor social support. On a chart entitled Mental Abilities and Aptitudes Needed to  
12 Do Unskilled Work, under “complete a normal workday and workweek without interruptions from  
13 psychologically based symptoms,” Dr. Assad checked “no useful ability to function.” *Id.* at 551.  
14 He also indicated on the questionnaire that he anticipated that plaintiff’s impairments or treatments  
15 would cause her to be absent from work about three days per month. *Id.* at 553. He opined that  
16 plaintiff would be unable to meet competitive standards of understanding, remembering, and  
17 carrying out detailed instructions, or dealing with the stress of semiskilled or skilled work, and that  
18 she would be more than limitedly impaired in performing at a consistent pace without an  
19 unreasonably number and length of rest periods, accepting instructions and responding appropriately  
20 to criticism from supervisors, and dealing with normal work stress. *Id.* at 551-554. He references  
21 plaintiff’s memory loss as a basis for these conclusions. *Id.* at 552.

25 The ALJ, however, discredited many of Dr. Assad’s conclusions as set forth on the form  
26 discussed above, because they contradicted other statements on the same questionnaire as well as his  
27 treatment notes. *Id.* at 45-46. For example, on the questionnaire Dr. Assad also assessed that  
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1 plaintiff would be capable of satisfactorily maintaining regular work attendance, remembering work-  
2 like procedures, understanding, remembering and carrying out very short and simple instructions,  
3 sustaining an ordinary work routine without supervision, working in coordination with or proximity  
4 to co-workers, asking questions and requesting assistance, and remaining aware of normal hazards  
5 and taking appropriate precautions. *Id.* at 551. Dr. Assad saw plaintiff monthly, but the notes from  
6 the majority of the visits reflect that plaintiff's mood was euthymic; only in seven of twenty-two  
7 visits did the doctor note any depressed mood. *Id.* at 626-644. Additionally, treatment notes from  
8 Nurse Kiehn and Dr. Berman repeatedly documented a normal mood and affect and the absence of  
9 any symptoms of depression, anxiety, or inability to concentrate. *Id.* at 648-698. Treatment notes  
10 from Northern Nevada Adult Mental Health Services indicate plaintiff showed interest and  
11 enthusiasm for group exercises, and that in individual sessions, she appeared alert and oriented with  
12 linear logical thought process and displayed judgment, insight and impulse control "sufficient to  
13 meet her basic needs." *Id.* at 620-622. No objective medical evidence in the record suggests  
14 memory loss; in fact, the evidence indicates that plaintiff's memory is "grossly intact." *Id.* at 46,  
15 524-27.

19 The ALJ also considered the report of consultative examiner Richard W. Lewis, Ph.D. *Id.* at  
20 524-27. Dr. Lewis concluded that plaintiff is able to "understand, remember and carry out simple  
21 one and two step and detailed levels of instructions. Her concentration, attention and short term  
22 recall functions are sufficient to support these ratings." *Id.* at 526. He based his opinion on  
23 plaintiff's fast and accurate completion of serial 7's, serial 3's, and alphanumerical counting  
24 abilities, her successful completion of delayed recall and proverb and comprehension testing. He  
25 assessed "She is not seriously mentally ill nor behaviorally disturbed and can interact appropriately  
26 with supervisors, co-workers and the general public." *Id.* He based this opinion on her cooperation  
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1 in the evaluation process, her ability to cope well with real world stressors, and her appropriate  
2 friendliness during the examination. *Id.* at 525. The ALJ accorded great weight to Dr. Lewis's  
3 opinion and found it consistent with her determination that plaintiff can perform uncomplicated,  
4 semi-skilled work. *Id.* at 46.

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6 The ALJ gave little weight to two state agency psychological consultants who reviewed the  
7 record and concluded that plaintiff had no restrictions of daily living and no difficulties maintaining  
8 social functioning, concentration, persistence or pace. She discounted these opinions because she  
9 determined that the record as a whole demonstrates mild to moderate difficulties. *Id.* at 47. The  
10 ALJ accorded significant weight to the assessment of state agency consultant Mayenne Karelitz,  
11 M.D., who reviewed the medical records relating to plaintiff's back issues, headaches and  
12 myofascial pain. *Id.* Dr. Karelitz considered plaintiff's documented spinal compression fractures,  
13 kyphoplasties (a procedure used to treat such fractures), her use of narcotic pain medications, trigger  
14 point injections and epidural shots for myofascial pain, and complaints of increased neck pain and  
15 headaches with a normal brain MRI and EEG. *Id.* at 516-523. The consultant also took into account  
16 plaintiff's subjective complaints. Dr. Karelitz opined that the plaintiff would be able to perform  
17 light work avoiding concentrated exposure to hazards, with only occasional balancing, stooping,  
18 kneeling, crouching and crawling. *Id.* The ALJ found these conclusions consistent with the record  
19 as a whole, except that they did not take into account plaintiff's dizziness. *Id.* at 47. Thus, the ALJ  
20 further restricted plaintiff to no climbing. *Id.*

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22 The ALJ concluded that plaintiff has the residual functional capacity to perform light work as  
23 defined in 20 C.F.R. § 404.1567(b) except that she may not climb; may only occasionally balance,  
24 stoop, kneel, crouch and/or crawl; and must avoid working at heights or operating dangerous moving  
25 machinery. She is further limited to uncomplicated work of a semi-skilled nature. *Id.* at 42.

1 Plaintiff bears the burden of proving disability. *See* 20 C.F.R. §§ 404.1512(a), 416.912(a).  
2 Notably, two consultative examiners found that plaintiff had *no* functional limitations. However, the  
3 ALJ accorded the most weight to the reports of consultative psychological examiner Dr. Lewis and  
4 state agency physician Dr. Karelitz. The ALJ concluded that these two reports—which both  
5 assessed mild to moderate functional limitations—were consistent with the medical records as a  
6 whole. Plaintiff argues that the ALJ did not properly weigh the opinion of her treating physician.  
7 However, the ALJ set forth an appropriate basis for according less weight to Dr. Assad’s opinions as  
8 set forth on the questionnaire because Dr. Assad’s statements on the largely check-the-box form  
9 were conclusory and because his own treatment notes contradicted the conclusion that plaintiff’s  
10 impairments were severe enough to prevent her from working. *Id.* at 32. *See Batson v. Comm’r*,  
11 359 F.3d 1190, 1195 (9<sup>th</sup> Cir. 2004) (treating physicians’ views carried only minimal evidentiary  
12 weight because they were in the form of a checklist, did not have supportive objective evidence and  
13 were inconsistent with other evidence). An ALJ may permissibly reject a treating physician’s  
14 opinion when that opinion is inconsistent with the physician’s own treatment notes and when the  
15 opinion is not supported by clinical findings. *See* 20 C.F.R. §§ 404.1527(c)(3) & (c)(4); *Bray v.*  
16 *Comm’r*, 554 F.3d 1219, 1228 (9<sup>th</sup> Cir. 2009). The medical records provide no objective findings to  
17 support Dr. Assad’s conclusions on the form that plaintiff is severely limited. Accordingly, the court  
18 finds that substantial evidence supports the RFC determination.

#### 23 **D. Credibility Determination**

24 Plaintiff also argues that the ALJ’s findings as to her credibility were not supported by  
25 substantial evidence in the record and that she failed to articulate clear and convincing reasons for  
26 not fully crediting plaintiff’s pain and limitation testimony (#15, pp. 14-17).  
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1           The ALJ is responsible for determining credibility and resolving conflicts in medical  
2 testimony. *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). The ALJ must evaluate the  
3 credibility of a claimant's subjective testimony in a two-step analysis. *Lingenfelter v. Astrue*, 504  
4 F.3d 1028, 1035-36 (9th Cir. 2007). "First, the ALJ must determine whether the claimant has  
5 presented objective medical evidence of an underlying impairment which could reasonably be  
6 expected to produce the pain or other symptoms alleged" (*id.* at 1036; 42 U.S.C. § 423(d)(5)(A) ("an  
7 individual's statement as to pain or other symptoms shall not alone be conclusive evidence of  
8 disability")). If the claimant meets the first test and there is no evidence of malingering, the ALJ  
9 may only reject the claimant's testimony about the severity of the symptoms if he or she gives  
10 'specific, clear and convincing reasons' for the rejection. *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th  
11 Cir. 2009) (quoting *Lingenfelter*, 504 F.3d at 1036). "These findings, properly supported by the  
12 record, must be sufficiently specific to allow a reviewing court to conclude the adjudicator rejected  
13 the claimant's testimony on permissible grounds and did not arbitrarily discredit a claimant's  
14 testimony regarding pain." *Bunnell v. Sullivan*, 947 F.2d 341, 345-46 (9th Cir. 1991) (en banc).

15           "Factors that the adjudicator may consider when making such credibility determinations  
16 include the claimant's daily activities, inconsistencies in testimony, effectiveness or adverse side  
17 effects of any pain medication, and relevant character evidence." *Orteza v. Shalala*, 50 F.3d 748,  
18 750 (9th Cir. 1995). While medical opinions are not controlling in assessing credibility, they are  
19 nonetheless probative evidence for the ALJ to consider. 20 C.F.R. §§ 404.1529(c),  
20 416.929(a)(2012); *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001). "[L]ack of medical  
21 evidence . . . is a factor that the ALJ can consider in his credibility analysis." *Burch*, 400 F.3d at  
22 681. However, "[t]he fact that a claimant's testimony is not fully corroborated by the objective  
23 medical findings, in and of itself, is not a clear and convincing reason for rejecting it." *Vertigan v.*

1 *Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001) (citing *Smolen v. Chater*, 80 F.3d 1273, 1285 (9th Cir.  
2 1996). The causal relationship between the objective evidence of a medical impairment and the  
3 claimant's complaints need only be a "reasonable inference," not a "medically proven phenomenon."  
4 *See Smolen*, 80 F.3d at 1282.  
5

6 In this case, the ALJ found that plaintiff's medically determinable impairments could  
7 reasonably be expected to cause the alleged symptoms, but that plaintiff's statements that she is  
8 unable to work due to her mental and physical conditions and limitations are not credible to the  
9 extent they are inconsistent with the ALJ's RFC determination (AR 43). Plaintiff reports that she  
10 has constant pain, muscle spasms, and reduced range of motion. *Id.* at 197. She testified at the  
11 hearing that she wakes up in the morning and gets her son off to school, and then she does some  
12 light housework, with rest periods as needed. *Id.* at 60-61. She drives to the grocery store if it is  
13 only for a few things or for prescriptions; if she needs to do more she takes her son with her. She  
14 takes pain medication daily. She watches television, knits for short periods, attends her son's violin  
15 concerts at school. She can walk "pretty good," can sit or stand each for no longer than thirty  
16 minutes, can walk for a bit longer than that. *Id.* at 65-66. Plaintiff testified that pain from her chin  
17 to her hips prevents her from working. *Id.* at 66. She stated that she takes medication for depression  
18 but that it does not work very well. *Id.* at 71.  
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22 The ALJ concluded that while plaintiff's type and frequency of treatment and prescribed  
23 medications are consistent with her claim of pain, the record contains substantial evidence that her  
24 conditions are not as limiting as she alleges. *Id.* at 43. The ALJ states that the record supports a  
25 significant back injury. The ALJ also found that plaintiff underwent several procedures and a  
26 number of regular trigger point and steroid reductions to reduce her myofascial pain throughout  
27 2009-2011 and that almost every treatment note indicates that she reported significant relief.  
28



1 Plaintiff claims that she has reduced range of motion. However, treating physician Dr. Berman's  
2 clinical observations show a full range of motion in her back, normal strength, and no evidence of  
3 muscle wasting. *Id.* at 44, 393-94. No treating or examining physicians indicated that plaintiff has  
4 any physical limitations at all. *Id.* at 45, 283, 286, 393-94. The ALJ also noted that a Social  
5 Security field office employee documented observations that plaintiff had no difficulty hearing,  
6 reading, breathing, understanding, concentrating, talking, answering, sitting, standing, walking,  
7 seeing, using her hands, or writing and was coherent during the in-person interview in September  
8 2009. *Id.* at 45, 174.

11 With respect to plaintiff's migraines, she states that they occur bi-monthly and are triggered  
12 by medications and stress. *Id.* at 197. She states that most days she does not get out of bed either as  
13 a result of migraines or depression. *Id.* at 217. She also stated that she is able to help two of her  
14 children with homework, feed and clothe them, shower, dress, and get a few things done around the  
15 house. *Id.* Plaintiff told consultative examiner Dr. Lewis that during a typical day, "[S]he works  
16 around the house and gets on the computer looking for work. If it is hot she goes to the pool to put  
17 her feet in the water. She goes to appointments and spends time with family." *Id.* at 44, 525. She  
18 also reported going grocery shopping and participating in preparing dinner. *Id.* She reported no  
19 marked increase in migraines two months after the March 2009 ATV accident and that her  
20 headaches improved with medication. *Id.* at 44-45, 382. With respect to depression, as discussed  
21 above in relation to the ALJ's RFC findings, plaintiff claims debilitating depression; however, the  
22 medical records and reports of treating and examining physicians contain no references to any  
23 inability to perform activities of daily living or work activities. *Id.* at 45, 524-527, 620-22, 648-98.

26 Plaintiff also testified that she has poor concentration; she stated that after discussing or  
27 staying on a topic for about thirty to forty-five minutes she would "probably get side tracked and  
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1 start talking about something else.” *Id.* at 71. Plaintiff’s son testified about her alleged memory  
2 problems. He stated that since the accident his mother’s memory has not been very good: “she’ll  
3 ask me a question and I’ll answer and she’ll ask the same question like a minute later.” *Id.* at 74. He  
4 said that his mother will completely forget she did something. When asked for an example, he stated  
5 that once she drank his Powerade and apologized, and then the next day she denied that she drank it.  
6 *Id.* at 75. He was unable to think of other examples. *Id.* Treating physician Dr. Berman noted in  
7 September 2009 that plaintiff was “alert, oriented, and answering questions appropriately . . . .  
8 Neurological examination is intact.” *Id.* at 385. Treating nurse practitioner Bayless noted in  
9 November 2009 that plaintiff was “alert and oriented” and working part-time. *Id.* at 449. Dr. Lewis  
10 performed several psychological tests and noted that plaintiff’s memory recall was “accurate and  
11 very fast” and that she recalled all three words after ten minutes. *Id.* at 526. Dr. Lewis concluded  
12 that plaintiff had “concentration, attention and short term recall functions” sufficient to carry out  
13 detailed instructions. *Id.*

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17 The court concludes that the ALJ’s credibility determination is supported by the record and  
18 that she did not arbitrarily discredit plaintiff’s subjective testimony. *See Thomas v. Barnhart*, 278  
19 F.3d 947, 959 (9<sup>th</sup> Cir. 2002) (citing *Bunnell*, 947 F.2d at 345-46) (lack of objective evidence to  
20 support a claimant’s description of her pain and limitations is a valid reason to discount her  
21 testimony); *Verduzco v. Apfel*, 188 F.3d 1087, 1090 (9<sup>th</sup> Cir. 1999) (testimony’s inconsistency with  
22 the medical record is a valid reason for rejecting the testimony). “If the ALJ’s finding is supported  
23 by substantial evidence, the court ‘may not engage in second-guessing.’” *Tommasetti, v. Astrue*, 533  
24 F.3d 1035, 1039 (9<sup>th</sup> Cir. 2008). The ALJ properly weighed that plaintiff’s subjective pain and  
25 limitation complaints were not supported by the medical record and that plaintiff’s own statements  
26 and testimony about her limitations and daily activities were often contradictory. Plaintiff argues  
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1 that her daily activities should not have undermined her credibility because they “were interspersed  
2 with rest periods.” (#15, p. 15). However, a plaintiff’s ability—even a qualified ability—to perform  
3 a range of daily activities may be a valid basis to discount her credibility. *See Molina v. Astrue*, 674  
4 F.3d 1104, 1112-13 (9<sup>th</sup> Cir. 2010) (“Even where those activities suggest some difficulty  
5 functioning, they may be grounds for discrediting the claimant’s testimony to the extent that they  
6 contradict claims of a totally debilitating impairment.”). The ALJ found that plaintiff’s son was not  
7 a reliable witness. While he testified that his mother could not remember the answer to a question  
8 for longer than one minute, there is no objective medical evidence of memory loss throughout the  
9 record (AR 44).

12 Finally, the ALJ properly considered that plaintiff’s physical and mental impairments were  
13 adequately controlled through medication, finding that plaintiff had reported “dramatic benefit” and  
14 that her overall pain is improved by relaxation and medications. *Id.* at 40-41, 43-45; *see Warre v.*  
15 *Commissioner of Social Sec. Admin.*, 439 F.3d 1001, 1008 (9<sup>th</sup> Cir. 2006); 20 C.F.R. §  
16 404.1529(c)(3)(iv)-(v). The court recognizes that the ALJ’s credibility determination is entitled to  
17 deference if it is supported by substantial evidence in the record, and the court finds that the ALJ  
18 properly supported and adequately explained her partially adverse credibility determination with  
19 specific, clear, and convincing reasons. Accordingly, remand or reversal is not warranted.

#### 22 IV. CONCLUSION

23 Based on the foregoing, the court concludes that substantial evidence in the record supported  
24 the ALJ’s RFC determination. Regarding plaintiff’s credibility, the ALJ gave specific, clear and  
25 convincing reasons for partially discounting plaintiff’s subjective symptom and limitations  
26 testimony, and this decision also was supported by substantial evidence in the record. The court  
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1 therefore recommends that plaintiff's motion for remand and/or reversal (#15) be denied and that  
2 defendant's cross-motion to affirm (#17) be granted.

3  
4 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Local Rule IB 3-2, the parties may file  
5 specific written objections to this Report and Recommendation within fourteen days of receipt.  
6 These objections should be entitled "Objections to Magistrate Judge's Report and Recommendation"  
7 and should be accompanied by points and authorities for consideration by the District Court.

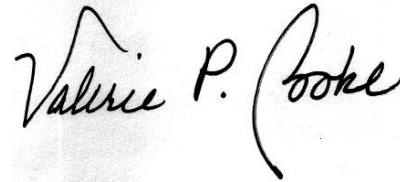
8  
9 2. This Report and Recommendation is not an appealable order and any notice of appeal  
10 pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's judgment.

11 **V. RECOMMENDATION**

12 **IT IS THEREFORE RECOMMENDED** that plaintiff's motion for remand and/or reversal  
13 (#15) be **DENIED** and defendant's cross-motion to affirm (#17) be **GRANTED**.

14 **IT IS FURTHER RECOMMENDED** that the Clerk **ENTER JUDGMENT** accordingly  
15 and close this case.

16  
17 **DATED:** May 13, 2014.



18  
19 **UNITED STATES MAGISTRATE JUDGE**